

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH THORNTON,

Defendant-Appellant.

UNPUBLISHED

September 24, 2002

No. 234036

Wayne Circuit Court

LC No. 00-008249-01

Before: O’Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, four counts of first-degree criminal sexual conduct, MCL 750.520b, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of imprisonment of 25 to 50 years for the armed robbery conviction, 80 to 120 months¹ for the assault conviction, and life for each count of criminal sexual conduct, to run consecutive to a two-year term of imprisonment for the felony firearm conviction. Defendant appeals as of right. We affirm defendant’s convictions, but vacate the sentences and remand to the trial court for resentencing.

During the early morning hours of April 3, 2000, a man carrying a gun accosted the victim as she was walking from her bus stop to her place of employment. The man directed her to walk until they reached an area near a dumpster. Initially, the man ordered the victim to give him her earrings, and then to run into an alley. She did as she was told, ultimately stopping in a bushy area near a garage or building. There, the man ordered the victim to disrobe and he then forced her to engage in two acts of fellatio and both anal and vaginal sexual penetration. The man also took her money and a pager. He then directed her to lay on her stomach with her hands on top of her head, and shot her in the leg. After her attacker fled, the victim made her way to her place of employment and her coworkers assisted her and summoned police and medical assistance.

¹ Although the judgment of sentence indicates a maximum of 220 months for the assault conviction, it is apparent from the record that the maximum sentence imposed on that conviction was 120 months.

At trial, the defense conceded that the crimes of robbery, assault, criminal sexual conduct and felony firearm as alleged were committed, but maintained that the victim misidentified defendant as her attacker. The only disputed issue at trial was the identification of defendant as the perpetrator. The prosecutor relied exclusively on the victim's identification of defendant. Defendant challenged the identification through discrepancies between the description the victim gave police shortly after the attack and the actual appearance and characteristics of defendant, the lack of opportunity for the victim to observe her attacker due to the nature of the incident and the lighting conditions, problems with the lineup procedure, and the lack of corroborating evidence.

On appeal, defendant first claims that a supplemental instruction that the trial court gave in response to a question from the jury during deliberations was improper because the instruction included facts that were not in evidence. The question from the jury requested the results of DNA testing. During trial, defense counsel cross-examined the investigating officer, who confirmed that a rape kit had been utilized in connection with the treatment of the victim at the hospital and that blood samples were taken from defendant for possible DNA testing. The prosecutor did not address the issue of DNA testing on redirect and no other mention was made of DNA testing at trial. Over defendant's objection, the trial court instructed the jury:

Oh, I have the note, ladies and gentlemen. And it's very difficult for the [c]ourt to make an explanation without commenting on the evidence. And the [c]ourt is not supposed to comment on the evidence.

However, if I don't answer the question, there's going to be another question right after that. And the question is about, "We would like to know if we can have the results of the DNA test?"

Well, you have to leave something to be tested. So, you look to the evidence to see if there was any trace evidence left for them to make a comparison with. Just look and see if you heard anything like that. You know.

So that's the only way I can answer your question. What was taken from the scene to make a comparison? Okay.

We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The trial court is responsible not only for instructing the jury on the applicable law, but it also is permitted to comment on the evidence "as in his opinion the interest of justice may require." MCL 768.29.

On the facts of this case, we disagree with defendant's assertion that the trial court's supplemental instruction was improper. The only reference to DNA testing was contained in questions asked of the investigating officer and the victim. The testimony was apparently of no consequence to defendant's defense because counsel for defendant made no further inquiry regarding DNA testing, and did not base any of his argument to the jury on the lack of DNA testing. Nevertheless, the reference to DNA triggered a question from the jury. Apparently, in an effort to dispel this as an issue, the trial court commented obliquely on the absence of

evidence in the record regarding any trace evidence that could be used for DNA testing. In doing so, we believe the trial court properly attempted to allay the jury's concerns and thereby redirect their attention to issues raised by the evidence and the arguments of the attorneys. Further, the instruction did not introduce new evidence into the case as defendant maintains. It only directed the jury to consider the absence of evidence when thinking about DNA testing. We believe the trial court acted within the discretion afforded it under MCL 768.29.

Next, defendant argues that the trial court erred in admitting opinion evidence from a police officer regarding the ability of the victim to give to the police an accurate description of her attacker shortly after the attack. Specifically, defendant objects to the admission of the following testimony:

Q. [prosecuting attorney] You indicated you have some problems locating the scene, et cetera, based on the initial information that was given to you?

A [Police officer] Um-hum.

Q.. Do you have any reason – any reason, based on your experience and expertise as to why that may have been?

A. Well, a lot of times people are upset. And you know, she's very upset from what happened. She's basically – she's in trauma. I mean, she's shot in the leg --

* * *

Q. Based on her condition, would that be a fair assumption, that that had some effect on the information you received?

A. Absolutely.

This Court reviews a trial court's admission of evidence for an abuse of discretion, but when a decision regarding the admission of evidence involves preliminary questions of law, such as whether a rule of evidence precludes admissibility of the evidence, those questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Initially, we find without merit defendant's characterization of this testimony as being offered in part to explain why the victim was unable to give the police an accurate description of her attacker. Read in context, the testimony was presented to explain why the officers had trouble locating the specific place where the charged offenses occurred from the information that the victim provided to them. Defendant fails to cite, and we are unaware of, any instance during the trial where the prosecutor used this testimony to attempt to explain away the discrepancies between the victim's descriptions of her attacker and the actual appearance of defendant. Consequently, even if we were to agree with defendant that the evidence was improperly admitted, defendant cannot establish that the error constituted a miscarriage of justice under the standard that it is more probable than not that a different result would have occurred had the testimony been excluded. *Lukity, supra* at 495-496. The ability of the victim to direct the police

to the location where she was attacked was not a fact of sufficient consequence so that the result in this case probably would have been different.

Further, we find that the trial court did not abuse its discretion in admitting this testimony. MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

This rule is applicable here because despite the prosecutor's reference to the officer's experience and expertise, we are satisfied that the officer was not testifying as an expert and the evidence was based on the officer's perception of the victim. We believe that the few minutes that the officer had to observe the victim before she was transported to the hospital was sufficient to form the opinions about which he testified. Finally, we believe the evidence was helpful in explaining the situation and in understanding why misinformation was communicated to the officers on the scene regarding the location where the incident occurred.

Defendant also claims that the trial court erred in failing to instruct the jury that the prior inconsistent statements of the victim from the preliminary examination that were admitted as evidence in the trial could be used as substantive evidence pursuant to MRE 801(d)(1)(A). We, however, need not address the merits of this claim because defendant indicated on the record his satisfaction with the instructions that the trial court gave to the jury. Consequently, defendant has waived the right to assert a claim of instructional error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

Finally, defendant claims, and the prosecution agrees, that the trial court erred in failing to articulate substantial and compelling reasons for deviating from the legislative guidelines sentence recommendation. We agree. The record shows that the trial court expressed the belief that it had the authority to impose a sentence without regard to the legislative guidelines.² MCL 777.1 *et seq.*; MCL 769.34. Contrary to the opinion of the trial court, the guidelines control. *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). Therefore, we vacate the sentences in this case and remand to the trial court for resentencing. On remand, the trial court shall impose sentences within the guidelines, unless it articulates substantial and compelling reasons to depart from the range stated in the legislative guidelines. MCL 769.34(3); *Hegwood*, *supra*.

Defendant's convictions are affirmed, defendant's sentences are vacated, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra

² Because the offense occurred after January 1, 1999, the legislative guidelines apply to this case. MCL 769.34(2).